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NULLUM TEMPUS OCCURRIT REGI.

THE English common-law rule, that the *limitation* will not run against the king, has been adopted in every one of the United States, and *nullum tempus occurrit reipublicæ*, is now firmly established law here. For example, a natural person may be prosecuted and punished for crime at any time whatever after the alleged perpetration of the offence; and an action may be maintained, and judgment rendered against any person for the delivery of possession of land wrongfully held, at any time whatever, unless after twenty-one years from the time that the government ceased to be the owner. Such action and judgment may be had by any grantee of the government. Such is the well-settled general common-law rule. But, like every other general rule, it has its exceptions, which are said to strengthen the general rule.

Where the legislature has by voluntary statutory enactment limited the time within which prosecutions for crime may be commenced, we see an exception to the first-mentioned branch of the rule. And it is believed that where the government has parted with the equitable title, we have an exception to the second stated branch of the rule, at least in the United States.

A natural person may here acquire an equitable title to a tract of the public land, in several ways, three of which are very familiar, and of course what the person gets the former possessor loses. For what one has, with a right, none other can have with a right, at the same time.

First: A person who has made a lawful *entry* and *survey* on any of the public domain set apart as bounty land for soldiers, upon a military warrant valid in his favor, thereby acquires an equitable title to such survey, has a right to the possession, and to a conveyance from the government.

Second: An equitable title is acquired by *entry* of public lands: viz., by the person who purchases and pays for a tract of Congress Land (so called), at the proper Land Office.

And Third: Possession taken and maintained under any of the Pre-emption Acts of Congress, and the payment of the price required by such act, and at the time required, vests an equitable title in the pre-emptor. Locators under treaty stipulations also acquire such equities.

And all these titles are assignable, and good in the hands of the assignee. And in all of these cases the government certainly holds the legal title in trust for the use of the first equitable owner and his assigns.

To discuss and support this second-mentioned exception to the rule *nullum tempus*—to show that unless saved by disability, the limitation should begin to run in favor of the occupant immediately when the equitable title has passed from the government to the citizen, is the object of this writing. This can be done, it is believed, upon principle, and upon authority.

First: It is consistent with the practical workings of our complicated and compound system of combined State and Federal authority: viz., in the matter of the *taxation* of such lands by state legislation. The power to tax would be nugatory without the power to disseise the delinquent who refuses to pay the assessment. And if the general rule is to be enforced without the exception the delinquent may, fifty years or even more after the tax sale, sue out a patent and recover the land from the tax purchaser.

The Supreme Court of Ohio, after full argument and mature consideration, have adjudged that a tax sale made in compliance with statute vests the tax purchaser with a title *in fee: Gwynne* v. *Niswanger*, 20 Ohio 556. This decision, as far as the writer has been able to learn, has never been overruled or even controverted by any court, either state or national. It seems, however, to go further than necessary, and further than warranted by a reasonable application of the principles of law. Would it not have been sufficient to hold the general government, before patent, and

her grantees after, to be seised of the legal title in trust for the use of the tax purchaser, who had got the interest of the delinquent? It is immaterial, however, whether the tax sale carries a title *in fee*, or whether it be merely evidence of the passage of the equitable title from the delinquent, to the purchaser. In either case the rule *nullum tempus* is curtailed, and the exception sustained.

In the newer states this power to tax has been recognised and limited by express Act of Congress (3d U. S. Stats. at Large 291, 349, 443, 492, 549); and in the older states either reserved or used as a matter of course.

By the Virginia Deed of Cession the United States held the military district in Ohio in trust for the use of Virginia soldiers entitled to bounty land, and Ohio *did* tax located tracts thereof before patent.

Second: The reason upon which the general rule rests being absent in the cases mentioned, of owners of unpatented lands, the rule itself should be relaxed and the exception prevail. Because the king cannot be present in every place at the same time, and should not suffer loss or injury in his lands by reason of the negligence or unfaithfulness of his agents; therefore no lapse of time of adverse possession can be permitted to *injure* him. Where the king would not be in danger of loss, the reason being wanting the rule should not be applied. Now should the crown part with the equitable title to a piece of land, retaining nothing therein, but only the bare, naked, legal title, it would lose nothing by any number of assignments of equities therein, nor by any number of changes of possession thereof. And the limitation should be made to run as between subjects.

Perhaps there is no instance of equitable title emanating from the crown and resting in the subject; but as we have seen, the thing is almost universal here; and as the government has in every instance received the value of the land: by military services; by pre-emptors' settlement of wild districts; by money; by treaty reciprocities and the like, it has nothing, in the premises to lose, and may well hold legal title in trust for the use of the occupant with right. So that the statutes of *rest* should begin to run as soon as the government has received consideration for the land in any of the ways mentioned, for the beneficial ownership has passed to some *person*, and the limitation is only a means of judicially knowing to whom.

This suggests the remark: That when twenty-one years' adverse possession of patented lands raises the conclusive presumption of a grant, *a fortiori* the same length of time with the same kind of possession, should, and does, justify the same presumption of an assignment of the equitable right. The reason for the latter being stronger in this: That conveyances are executed with solemnity and in form, and mostly with attestation, magisterial acknowledgment and record: while assignments need no solemnities, require no witnesses, no form, no record; and indeed, in some of the states may be in parol, if with possession. So that as a matter of reasonable presumption of fact, the assignment should rather be presumed to have been made and lost, than that a deed was made and lost, as in the case of the patented lands.

It will scarcely be claimed that possible reversion to the government, in case the person who first acquired from it the equity with all his heirs and representatives, should be lost, should be insisted on at the expense of an occupant who has no means of proving his assigneeship excepting the presumption founded upon the lapse of time. The continued enforcement of the rule under consideration, without the exception, substantially tenders a premium on fraudulent negligence.

For instance: A. acquires an equitable title to a tract of land, in any one of the ways mentioned above, takes out no patent, neglects to pay taxes, and the land goes into the possession of a tax purchaser. Or A. sells the land by written contract and receives payment. Or indeed sells the land by contract in parol with payment and possession, which in some of the states takes the contract out of the operation of the Statute of Frauds. Now A. has no substantial interest in suing out a patent, and he neglects to do so, or he may fraudulently and purposely abstain from doing it; nor can the occupant do so, without the proper documentary evidence, which is in A's. posssesion, and he is absent, and it is neglected by the purchasing occupant in ignorance and in good faith, until after the lapse of fifty or a hundred years, the land having in the mean time become very valuable by the general growth of the country, and especially by the labor and money of the occupant. And after the written title bond has been long lost, after the witnesses of the contract in parol have been long dead, after the record of the tax sale has gone where all waste paper goes: A. or his heirs sue out a patent, for they never, necessarily,

parted with the evidence of their right to have conveyance: file declaration in a court of law in ejectment, and of course recover. And nothing is left to the real owner of the land, but to pay costs and counsel fees and take the poor compensation to which he is entitled under the occupying claimant statute and leave his home for ever. Such burlesques upon the administration of justice should not be permitted.

True, the courts of law in. the United States have very often affirmed the doctrine that the limitation cannot be pleaded in an action of ejectment unless the land had been granted by patent, to some person more than twenty-one years before the commencement of the action: For the reason that a grant to the occupant cannot be presumed (against the possibility) he could have no conveyance from the government, else it would be seen of record, nor could he by any possibility have had a conveyance from any other person, for no other person had the legal title to give. But on the other hand the courts of equity have just as often decreed the holder of the legal title to be a trustee for the use of the equitable owner. And that too on equitable assignments made long before issue of patent: *Duke* v. *Thompson*, 16 Ohio 34. So after all there is nothing left but a question of evidence going to the issue; assignment or not? And, as has already been suggested, it is more reasonable to take lapse of time as evidence of an assignment of equitable title, than to take lapse of time as evidence of legal title by deed. If the latter has always been done, where the *possibility* was not excluded, why shall not the former, also be done, unless possibility be excluded? And surely the retention of the legal title by the United States, does not bar the possibility of an assignment by title bond, by contract, by purchaser at tax sale, or the like. No other rule of the common law need be suspended. Nor need any rule of practice be infringed to give effect to the *exception* under consideration. Take for example: Plaintiff in ejectment will rest his cause upon a patent issued to him, and dated only one year ago. Defendant has been in adverse, open, peaceable and continuous possession for forty years, under purchase at forfeited tax sale. But by the death of persons and the loss of papers he is unable to prove a strict compliance with the tax statutes. So he cannot plead the general issue. Nor can he plead the limitation, for technically the plaintiff's cause of action did not accrue until issue of patent. Judgment at law

must be for plaintiff. But defendant will exhibit his bill in chancery showing the facts, and obtain a provisional injunction restraining the original plaintiff from enforcing his judgment at law. Then if the bill be traversed and supported by the evidence, the chancellor will make the injunction perpetual and decree a conveyance from the patentee to the occupant, on the ground that the former is trustee for the use of the latter. The same on demurrer to bill. And in Ohio, and other states, where the courts are supposed to possess law and chancery jurisdiction so combined as that the one or the other may be administered as the facts of each particular case may require, whether these facts be exhibited by the plaintiff or by the defendant, there need only be the petition showing that the plaintiff is the owner of the land, and has a right to the immediate possession thereof, and that the defendant keeps him out; and answer denying plaintiff's ownership and right of possession, and setting up defendants' tax purchase and possession; and reply denying the tax purchase, or general demurrer to answer. These alleged facts call for the exercise of the chancery powers of the court, for the patentee may be a trustee of the legal title. If the court find the possession as alleged, the lapse of time will raise the conclusive legal presumption, not of grant, but of assignment of the equitable title to defendant, from the state to which the land was forfeited for non-payment of taxes, or directly from the plaintiff or from his ancestors; and judgment will be for defendant that he recover his costs, and decree that plaintiff convey to him.

It may be objected that since the government cannot be sued, unless by special enabling statute, which does not exist, that no good could result from the enforcement of the exception; no decree could operate against the United States, nor give the occupant the legal title.

To this it may be answered: The substantial enjoyment of the possession is not diminished by the want of the legal title; and a special act might be passed authorizing the occupant to make the United States party defendant in chancery; or, which would be better, Congress might and should by statute authorize and require the commissioner of the general land-office to issue patents to such occupants upon documentary evidence filed in the Department of the Interior, showing the original equitable title to be more than twenty-one years old, and showing the necessary ad-

verse possession of the occupant, and notice, actual or constructive, served upon the recipient of the equitable title, or his representatives, of the pendency of the application. But at all events the courts will not actually give to one person the ability to perpetrate a wrong upon another, merely because Congress has neglected to furnish a proceeding by means of which the right may be affirmatively enforced. J. B. McL.

Bellefontaine, O.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

KIRSCHNER v. CONKLIN.[1]

The relative rights and duties of parties who endorse a promissory note for the accommodation of the maker, are the same as in the case of a business note. A subsequent endorser who pays it, may recover of a prior endorser the whole amount paid, and not merely a contribution, as in the case of sureties.

And it makes no difference that the endorsers both knew that each was an accommodation endorser, so long as there was no actual agreement between them to share the liability.

Nor in the absence of such an agreement, that the object of the endorsements was to enable the maker to get a loan at bank upon the note, and that they were to operate together as a security to the bank.

ASSUMPSIT by a second endorser against a prior endorser of a promissory note; brought to the City Court of the city of New Haven, and tried on the general issue closed to the court, with notice of the defence hereinafter stated. The following facts were found by the court:—

The note in question is dated April 8th 1872, and is for $450 payable in three months at the New Haven County Bank. It was made by John Rathgeber, and endorsed first by Conklin, the defendant, who was an accommodation endorser, and then endorsed by the plaintiff, who was also an accommodation endorser. It was duly presented for payment and protested for non-payment, and notice duly given to the plaintiff and the defendant. The note was afterwards, and before the present suit was brought, paid by the plaintiff.

[1] For this case we are indebted to the courtesy of Mr. HOOKER, the Reporter.—EDS. AM. LAW REG.